No. 06-1221

IN THE SUPREME COURT OF THE UNITED STATES

SPRINT/UNITED MANAGEMENT CO.,
Petitioner,

v.

ELLEN MENDELSOHN,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Tenth Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE* [1]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Almost half of AARP's more than 39 million members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA), which Respondent Ellen Mendelsohn alleges Petitioner Sprint/United Management Company violated by terminating her employment because of her age. Vigorous enforcement of the ADEA, pursuant to its congressionally mandated purposes, as well as numerous decisions of this Court and lower federal courts broadly interpreting its provisions, is of paramount importance to AARP, its working members, and the millions of other older workers who have come to rely on it to remedy, deter and eventually eliminate invidious, illegal work place age discrimination.

Amicus AARP urges the Court to seize the opportunity presented by this case to emphatically reject, as did the court below and as most other lower courts have done, the erroneous notion proffered by Petitioner that, in an individual discrimination case, anecdotal evidence of alleged discriminatory treatment of other employees of the defendant-employer is *per se* inadmissible to prove the defendant discriminated against the plaintiff, unless the other employees have the same supervisor as the plaintiff.

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[1] No counsel for any party authored any portion of this brief. No persons other than *amicus curiae* members or their counsel have made a monetary contribution to the preparation and submission of this brief. The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

The Tenth Circuit properly relied on this Court's decisions in *McDonnell Douglas, Reeves* and their progeny, as well as the Federal Rules of Evidence, among other authorities, in reversing a blanket pre-trial exclusion of "other-supervisor evidence" in this case. In doing so, the Tenth Circuit also properly identified categories of anecdotal evidence including "other supervisor evidence," that this Court and the lower federal courts have routinely permitted plaintiffs to use to meet their considerable burden to establish discriminatory intent in individual disparate treatment suits under the ADEA. Petitioner Sprint and its supporting *amicus* would have the Court reinstate the draconian exclusionary rule wrongly imposed by the *Mendelsohn* district court and have it apply in *all* individual ADEA cases, and by logical extension, in *all* employment discrimination cases. That is, Sprint asks this Court to announce a rule that would absolutely bar – despite voluminous contrary precedent in this Court and most others, long-established doctrine underlying federal evidence rules, and compelling circumstances in numerous workplace discrimination cases – *all* anecdotal evidence not demonstrably connected to an employee-plaintiff's own supervisor.

The Respondent and other *amici* supporting her in this case have presented a full account of how this Court's precedents and the Federal Rules of Evidence support a flexible, case-by-case approach to admission of anecdotal evidence, including "other supervisor evidence," in disparate treatment cases under the ADEA and other federal employment discrimination laws. Respondent's Brief on the Merits, *Sprint v. Mendelsohn*, No. 06-1221 (U.S. Oct. 19, 2007); Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law *et al* in Support of Respondent, *Sprint v. Mendelsohn*, No. 06-1221 (U.S. Oct. 19, 2007). In addition, the Solicitor General argues that these

authorities, among others, powerfully support a finding that in many instances, such evidence will be relevant and will not cause undue prejudice to a defendant employer. Brief for United States as *Amicus Curiae*, at 13-25, *Sprint v. Mendelsohn*, No. 06-1221 (U.S., Aug. 20, 2007).

Accordingly, *amicus* AARP focuses below on the lower federal courts' implementation of these authorities in ADEA and other employment discrimination cases, and in particular, rebuts Petitioner's suggestion that lower federal courts generally hold that anecdotal "other-supervisor evidence" (or as Petitioner would have it, "'me, too" evidence") necessarily "sheds [no] light on the motivation of" a plaintiff's supervisor, that is, the "decisionmaker" in a plaintiff's case, Brief for Petitioner ("Pet. Br."), at 21, *Sprint v. Mendelsohn*, No. 06-1221 (U.S., Aug. 20, 2007). *See id.* 21-27; *accord* Brief for Employers Group as *Amicus Curiae* in Support of Petitioner, at 5, *Sprint v. Mendelsohn*, No.06-1221 (U.S., Aug. 17, 2007) ("Testimony about [other] employ[ees'] personal beliefs that they were the victims of discrimination, ageist comments by other supervisors, another supervisor's layoff list, and an[other] employee's belief that another supervisor harassed an unrelated employee provides no insight into [the decisionmaker's] state of mind when he selected [the plaintiff] for layoff"). These assertions not only contradict many rulings of this Court, and the design established by the federal evidence rules, but also the overwhelming weight of lower court authority implementing decisions of this Court.

Like many other lower courts, the Tenth Circuit largely followed the path established by this Court's repeated admonitions, in *McDonnell Douglas, Reeves* and other cases, that in a number of respects, anecdotal evidence may be probative circumstantial proof in individual disparate treatment cases. Based on the ADEA's text, this Court has focused on the

discriminatory intent of *employers*, not just the presence of animus on the part of a specific *supervisor*. And while a supervisor delegated authority to act for the employer may be the principal actor in terminating an individual employee, this Court, and lower courts following its lead, have recognized that such a supervisor's actions adverse to a specific employee may – indeed, likely do – reflect the managerial environs in which she or he works – a "culture" or "atmosphere" of discrimination, "patterns" or "practices" of unequal treatment, or even explicit biased statements by a CEO or other senior manager, conveying that acting on stereotypes and/or bias is tolerated or even encouraged. *See, e.g., McDonnell Douglas v. Green*, 411 U.S. 792, 804-05 (1973) (declaring probative in an individual disparate treatment case evidence of an employer's "general policy or practice" with respect to employees in the same protected category). Thus, it is well-established that anecdotal evidence, including testimony of co-workers with other supervisors, often may significantly inform a factfinder whether an adverse employment action in an individual case reflects discriminatory motive or intent of the employer.

The relevance of circumstantial evidence beyond that of employees who share a common supervisor with the plaintiff is especially great in circumstances like those faced by Respondent, who was discharged as part of a centrally administered employer initiative – a "reduction-in-force" or "RIF" – affecting many more employees: *i.e.*, at the very least those within her entire business unit, and at most, the entire Sprint workforce.

Simply put, the rule advanced by Petitioner and supporting *amici* represents a dramatic retrenchment in employment discrimination law that would result in a severe contraction of the rights and protections conferred by Congress on victims of discrimination. Moreover, if this Court were to place its imprimatur on

the rigid *per se* exclusionary order rejected by the Tenth Circuit, such a decision would fatally compromise the ability of countless plaintiffs to effectively challenge intentional discrimination. *Amicus* AARP respectfully submits that this radical and manifestly unjust proposal is completely unwarranted by the facts of this or any other case. It is wholly unnecessary to supplement measures readily available to trial judges to limit the admission of anecdotal evidence and to control its use. The *per se* exclusionary rule advocated by Petitioner should be forcefully rejected by this Court.

ARGUMENT

In overturning the district court's categorical exclusion of Respondent's anecdotal, "other supervisor" evidence, the Tenth Circuit correctly concluded that "[t]he testimony of the other employees concerning Sprint's alleged discriminatory treatment and similar RIF terminations is 'logically and reasonably' tied to the decision to terminate Mendelsohn." Petitioner's Appendix ("Pet. App.") 9a (citing *Spulak v. K Mart Comp.*, 894 F.2d 1150, 1156 n.2 (10th Cir. 1990)). As the Court of Appeals acknowledged, circumstantial "[e]vidence of an employer's alleged prior discriminatory conduct toward other employees in the protected class has long been admissible to show an employer's state of mind or attitude toward members of the protected class." *Id.* at 3a (citations omitted).

The panel also noted that such conclusions are fully consistent with the Federal Rules of Evidence, under which evidence is relevant and admissible unless its probative value is outweighed by concerns of unfair prejudice, confusion or waste of time. *Id.* at 13a-14a (discussing Fed. R. Evid. 401, 403). Thus, in an individual discrimination case, relevant evidence is not, as Petitioner would have it, limited to facts concerning only an employee-victim, a specific supervisory "decisionmaker," and perhaps co-workers

for that same boss. This Court never has mandated, nor should it now endorse such a cramped framework for cases constituting the vast bulk of federal employment discrimination litigation.

To the contrary, this Court has emphatically stated that the ADEA, like Title VII, was designed "as part of an ongoing congressional effort to eradicate discrimination in the workplace." *McKennon v. Nashvile Banner Pub. Co.*, 513 U.S. 352, 357 (1995).[2/] To insure that this purpose one day may be fulfilled, this Court should reject Petitioner's invitation to apply its crabbed notion of relevance, which would devastate the remedial sweep of the ADEA. Rather, this Court should reaffirm its prior rulings to the contrary, and not overrule a multitude of lower federal court precedents applying them.

Because of the rarity of direct evidence of discriminatory workplace bias, because of the myriad influences that may bring about adverse employment actions, and because trial judges have ample tools to evaluate the relevance of anecdotal evidence and, in appropriate cases, to exclude or limit its use, a flexible evidentiary standard governs admission of anecdotal evidence in individual disparate treatment cases. Absent a sufficient justification for exclusion, such evidence, including the anecdotal "other supervisor evidence" challenged by Petitioner, should be admitted on the difficult and central issue of discriminatory intent.

[2/] Indeed, "[t]he ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." *McKennon*, 513 U.S. at 357. "The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'" *Id.* at 358 (citation omitted).

I. ANECDOTAL EVIDENCE, INCLUDING "OTHER SUPERVISOR EVIDENCE," IS OFTEN NOT ONLY HIGHLY RELEVANT, BUT ALSO INDISPENSABLE TO AN INDIVIDUAL PLAINTIFF'S PROOF OF DISCRIMINATORY INTENT.

At trial Respondent Ellen Mendelsohn was not afforded "a full opportunity to present her case" that she was selected for termination in a company-wide reduction-in-force (RIF) due to her age, because in a pretrial order the district court excluded testimony of former Sprint employees terminated in the same RIF. Pet. App. 2a.; *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 n.18 (1973). The Tenth Circuit correctly observed that excluding such evidence, via "[b]lanket pretrial evidentiary exclusions, in particular, 'can be especially damaging in employment cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives,'" Pet. App. 14a (quoting *Hawkins v. Hennepin Technical Center*, 900 F.2d 153 (8th Cir. 1990)).

A. This Court Never Has Endorsed The Sort Of *Per Se* Rule Of Exclusion Enforced By The District Court In This Case.

In *McDonnell Douglas*, this Court devised the now familiar inferential proof-construct that allows plaintiffs to attempt to prove intent to discriminate through a three-step process. A plaintiff, this Court held, bears the burden of proving pretext, and in doing so must be permitted latitude (amounting to a "full and fair opportunity") to marshall "competent evidence" to that effect, including anecdotal evidence. 411 U.S. at 805 n.18. Such evidence, the Court indicated, might include how the employer treated similarly situated employees other than plaintiff (with

no indication of the "same supervisor" limitation).[3] The Court later clarified that the *McDonnell Douglas* proof-construct "was never intended to be rigid, mechanized, or ritualistic. Rather it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Petitioner's proposed *per se* rule, limiting anecdotal evidence in ADEA cases to "single supervisor" evidence, transgresses both *Furnco* and *McDonnell Douglas*. It also violates this Court's admonition in *U.S. Postal Services Board of Governors v. Aikens*, 460 U.S. 711 (1983), against treating the "discriminatory intent" of an employer "differently from other ultimate questions of fact." 460 U.S. at 716. Rather, "[a]s in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves [emphasis supplied]. Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent." *Id.* The district court in this case took just the sort of detour of which the *Aikens* Court warned. This Court should rebuff Petitioner's renewed campaign for a restrictive rule little different from the misguided requirement of

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[3] Such evidence also may include proof of the employer's "general policy and practice" with respect to other protected-category employees, not necessarily under the same supervisor or "decisionmaker," as well as "statistics as to petitioner's employment policy and practice," which may "be helpful to a determination of whether petitioner's [treatment of] respondent in this case conformed to a general pattern of discrimination against [other employees in the same protected category]." *Id.* at 804-05.

"direct evidence" of discriminatory intent rejected in *Aikens*.

The lower federal courts have taken this Court's teachings to heart, and an about-face at this point is unwarranted and would disturb settled legal principles. In *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986), for instance, the court affirmed the admission at trial of evidence of harassment of black workers besides Hunter (as well as a judgment for plaintiff), explaining, "Given the difficulty of proving employment discrimination - the employer will deny it and almost every worker has some deficiency on which the employer can plausibly blame the worker's troubles – a flat rule that evidence of other discriminatory acts by or attributable to the employer can never be admitted without violating Rule 403 [of the Federal Rules of Evidence] would be unjustified." *Id.* at 1423. In short, evaluation of evidence in employment discrimination litigation must proceed on a case-by-case basis. The anecdotal, "other supervisor" evidence in *Hunter* "was relevant both in showing that [the employer] condoned racial harassment by its workers and in rebutting [employer's] defense that it had fired [plaintiff] for cause." *Id.*

In a sex discrimination decision issued two decades ago, *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987), Judge Posner opined that "a plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance." *Id.* at 698. Likewise, in *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988), a race and age discrimination case, the court of appeals recognized that Rule 403 may be used to exclude evidence, but declared that a trial court's "exercise of its discretion must not unfairly prevent a party from proving his case." *Id.* at 1102-03. These rulings reflect a longstanding, settled understanding

that the admissibility of evidence in individual disparate treatment cases under the ADEA and other federal employment discrimination statutes is a matter for careful judgment, case-by-case, and not *per se* rules.

B. Anecdotal Evidence Is Routinely Admitted In Individual Disparate Treatment Cases Because Of The Difficulty of Proving An Employer's Discriminatory Intent.

This Court has long recognized the challenges posed by having to prove discriminatory intent, especially in employment discrimination cases. It has declared "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination," *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 153 (2000), and further, that "[l]iability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision," *Hazen Paper v. Biggins*, 507 U.S. 604, 610 (1993) (citing *Aikens*, 460 U.S. 711); *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-57 (1981); *Furnco*, 438 U.S. at 576-78. And in *McDonnell Douglas*, this Court acknowledged that anecdotal evidence may be critical to an employment discrimination plaintiff's case, and in particular, on the central issue of pretext: "Evidence that may be relevant to any showing of pretext includes facts as to [the employer's] . . . general policy and practice with respect to minority [protected age group] employment." 411 U.S. at 804-05. Thus, the evidence that the Tenth Circuit held was excluded improperly in this case is precisely the type of proof this Court has deemed not only relevant, but critical to proving a claim of employment discrimination.

This Court also has "[r]ecogniz[ed] that 'the question facing triers of fact in [workplace]

discrimination cases is both sensitive and difficult,' and that '[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes,'" *Reeves*, 530 U.S. at 141, quoting *Aikens*, 460 U.S. at 716. For this reason, "the Courts of Appeals ... have employed some variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims that are based principally on circumstantial evidence." *Id.* at 141. As for what evidence is admissible under the *McDonnell Douglas* burden-shifting scheme, this Court repeatedly has declared: "the plaintiff – once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision – must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 253, and citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 503, 507-08 (1993)).

Lower federal courts have routinely and faithfully acted on this understanding. For instance, in *Hollander v. American Cyanamid Co.*, 895 F.2d 80 (2d Cir. 1990), an individual ADEA case in which the court reversed summary judgment for the employer, the Second Circuit reasoned that "[b]ecause employers rarely leave a paper trail – or smoking gun – attesting to a discriminatory intent, disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer." *Id.* at 85. Similarly, in *Conway v. Electro Switch Corp.*, 825 F.2d 593 (1st Cir. 1987) the First Circuit observed that "[D]iscrimination can often be of such a subtle, insidious character that a plaintiff may only be able to offer circumstantial evidence to buttress his or her claim." *Id.* at 597; *see also, e.g.*, *Hunter v. Allis-Chalmers Corp.*, 797 F.2d at 1423 ("Given the difficulty of proving employment discrimination – the employer will deny it, and almost

every worker has some deficiency on which the employer can plausibly blame the worker's troubles – a flat rule that evidence of other discriminatory acts by or attributable to the employer can never be admitted without violating Rule 403 would be unjustified."); *Riordan*, 831 F.2d at 697-98 (7th Cir. 1987) (explaining that proving employment discrimination "is always difficult," because defendants "will neither admit discriminatory animus nor leave a paper trial demonstrating it ... it is so easy to concoct a plausible reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative").

II. ANECDOTAL EVIDENCE OF INTENTIONAL BIAS IS ADMISSIBLE IF IT MAY INFORM THE FACTFINDER ABOUT INFLUENCES ON AN EMPLOYER'S ALLEGED DECISIONS ADVERSE TO A PLAINTIFF.

Through five co-worker witnesses in the protected class (age 40 or older), Respondent Mendelsohn sought to establish a pervasive "atmosphere" of age bias at Sprint. Pet. App. 2a. Thus although none of the five had the same supervisor as Respondent, they each were proffered to testify regarding influences on Sprint supervisors generally, including plaintiff's. The Court below concluded that "[a]ge as a motivation for Sprint's selection of Mendelsohn to the RIF becomes more probable when the fact-finder is allowed to consider evidence of (1) an atmosphere of age discrimination, and (2) Sprint's selection of other older employees to the RIF." *Id.* at 14a.

The Tenth Circuit reasoned that "[e]vidence of an employer's alleged prior discriminatory conduct toward other employees in the protected class has long been admissible to show an employer's state of mind or attitude toward members of the protected class.

Pet. App. 13a (citing *McDonnell Douglas*, 411 U.S. at 804; *Aikens*, 460 U.S. at 713-14 n. 2). This rationale is well supported by rulings of this Court and the lower federal courts.

A. The Court Should Decline To Adopt A Rigid Nexus Requirement For Admission Of Anecdotal Evidence.

The Tenth Circuit correctly held that in an individual employment discrimination case admissibility of anecdotal evidence of an employer's discriminatory intent does not depend on whether it is directly connected with the plaintiff's supervisor. Pet. App. 8a-9a. A rigid "nexus" requirement previously has been rejected by this Court and lower federal courts. Petitioner presents no sound basis for resurrecting such an impractical approach.

In *Reeves*, this Court held that an individual ADEA plaintiff may rely on anecdotal evidence consisting of discriminatory remarks, even when not made in the immediate context of a challenged employment decision, to prove that the employer's stated reason for terminating plaintiff was a pretext for age discrimination. 530 U.S. at 152-53. Finding that the Fifth Circuit "had discounted [the remarks] because they 'were not made in the direct context of Reeves' termination,'" *id.* at 152, this Court rejected the Fifth Circuit's analysis, concluding that a more "commonsense principle" is needed to evaluate such evidence, *id.* at 153-54 (Ginsburg, J., concurring).

Subsequent to *Reeves*, the Fifth Circuit in *Palasota v. Haggar Clothing Co.*, 342 F.3d 569 (5th Cir. 2003), explicitly abandoned the strict "nexus" requirements it had earlier imposed in *Wyvill v. United Companies Life Insurance Co.*, 212 F.3d 296 (5th Cir. 2000), a case decided two weeks before this Court's decision in *Reeves*. In *Wyvill*, the Fifth Circuit

had rejected testimony "from and about former employees in an effort to show that [defendant] . . . had a 'pattern or practice' of discriminating against older workers." *Id.* at 302. Contrary to this Court's subsequent guidance in *Reeves*, the *Wyvill* court reasoned that "[t]his court and others have held that testimony from former employees who had different supervisors than the plaintiff, who worked in different parts of the employer's company, or whose terminations were removed in time from the plaintiff's termination cannot be probative of whether age was a determinative factor in the plaintiff's discharge." *Id.* In light of this Court's *Reeves* decision, however, the Fifth Circuit in *Palasota* completely reversed its view of anecdotal evidence:

> *Wyvill* stated that, for an age-based comment to be probative of an employer's discriminatory intent, it must be "direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was a determinative factor in the decision to terminate the employee." *Wyvill*, 212 F.3d at 304. After *Reeves*, however, so long as remarks are not the only evidence of pretext, they are probative of discriminatory intent.

342 F.3d at 577. This history reveals Petitioner's significant reliance on *Wyvill, see* Pet. Br. 23-24, 41-42, to be misplaced.

B. "Nexus" Requirement Affects The Weight, Not The Admissibility Of Anecdotal Evidence.

Long before *Reeves* most courts regularly concluded that lack of a direct nexus between the proffered anecdotal evidence and the disputed employment decision affected the weight of the

evidence, which is determined by the trier of fact, not admissibility, which is for the court to decide. As the Sixth Circuit explained in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998):

> [defendant] argues that discriminatory remarks are irrelevant unless the plaintiff demonstrates a nexus between the discriminatory remarks and the adverse employment action. Although we believe a direct nexus between the allegedly discriminatory remarks and the challenged employment action affects the remark's probative value, the absence of a direct nexus does not necessarily render a discriminatory remark irrelevant.

Id. at 355. This Court should likewise so rule.

The *Ercegovich* court set aside a trial court's rejection of alleged discriminatory remarks by members of senior management as well as opinions of two Goodyear employees that the company discriminated against the plaintiff on the basis of age. *Id.* at 357. The district court refused to consider these statements on the ground that they did not concern specifically the decisionmaker who eliminated plaintiff's position. *Id.* In ruling this evidence was admissible, the Sixth Circuit explained that "[c]ircumstantial evidence establishing the existence of a discriminatory atmosphere at the defendant's workplace in turn may serve as circumstantial evidence of individualized discrimination directed at the plaintiff." *Id.* at 356. This is a critical link in the chain of reasoning implicit in many other decisions, discussed further below, embracing anecdotal evidence of a corporate "culture" or a corporate "atmosphere" condoning discrimination as probative of the employer's discriminatory intent in an individual disparate treatment case.

While it powerfully justified the admission and consideration of anecdotal evidence of employer bias, the *Ercegovich* court at the same time looked to a fellow tribunal, the First Circuit, in clarifying that admission of anecdotal evidence is not dispositive in a disparate treatment case:

> While evidence of a discriminatory atmosphere may not be conclusive proof of discrimination against an individual plaintiff, such evidence does tend to add 'color' to the employer's decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff.

Id. (quoting *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987)).[4]

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[4] This Court has ruled that a plaintiff's anecdotal evidence need not be dispositive to be relevant. *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996). Indeed, her burden is merely to provide "'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion....'" *Id.* (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977)) (alteration in *O'Connor*; emphasis omitted). In holding that the testimony of the five "other supervisor" witnesses was admissible, the Tenth Circuit acknowledged as much: "The evidence which Mendelsohn seeks to present, 'is certainly not conclusive evidence of age discrimination itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation' for its motive in terminating Mendelsohn." Pet. App. 14a (quoting *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 561 (10th Cir. 1996)); *accord Bevan v. Honeywell, Inc.*, 118 F.3d 603, 610 (8th Cir. 1997); *see Estes*, 856 F.2d at 1104 ("Evidence of prior acts of discrimination is relevant to an employer's motive in discharging a plaintiff, even where this evidence is not extensive enough to establish discriminatory animus by itself.").

Further, the *Ercegovich* court explained:

> Discriminatory statements may reflect a cumulative managerial attitude among the defendant-employer's managers that has influenced the decisionmaking process for a considerable time. Thus, the management's consideration of an impermissible factor in one context may support the inference that the impermissible factor entered into the decisionmaking process in another context.

Id at 356. To be sure, the Sixth Circuit in *Ercegovich* suggested there may be outer limits to the kind of links a plaintiff may show to justify the admission of – perhaps minimally relevant – anecdotal, circumstantial evidence in a disparate treatment case. Presumably any such limits would vary with circumstances presented in a specific case, including the nature of claims asserted and the form of anecdotal evidence at issue. Thus, in the analogous, yet different context of biased remarks by a corporate executive, the *Ercegovich* court stated:

> We do not mean to imply that any ageist comment by a corporate executive is relevant as evidence of a discriminatory corporate culture. Rather, the courts must carefully evaluate factors affecting the statement's probative value, such as 'the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action.'

Id. at 357 (quoting *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 133 (3rd Cir. 1997), *cert. denied,* 522 U.S. 1116 (1998)).

Nevertheless, the Sixth Circuit was emphatic – as *Amicus Curiae* AARP respectfully submits this Court should be – in declaring, "We therefore believe that 'evidence of a corporate state-of-mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or timeframe involved in the specific events that generated a claim of discriminatory treatment." *Id.* at 356 (quoting *Conway*, 825 F.2d at 597, in which the First Circuit rejected a similar "nexus" objection).

Based upon the type of analysis conducted by the court in *Ercegovich*, which the district court failed to do in *Mendelsohn*, the Tenth Circuit properly concluded, and this Court should likewise hold, that the anecdotal evidence at issue in this case was admissible.

C. Evidence Of An "Atmosphere" Of Discrimination Is Probative Of Discriminatory Intent.

This Court has a plethora of lower federal court experience and precedent to draw on should it decide, as *Amicus Curiae* AARP respectfully urges, to reaffirm the broad admissibility of anecdotal evidence of discrimination in individual disparate treatment cases. Many of these authorities approve admission of circumstantial proof of a corporate "atmosphere" conducive to discriminatory decision-making by an employer.

In *Abrams v. Lightolier Inc.*, 50 F.3d 1204 (3d Cir. 1995), the plaintiff, like Mendelsohn, alleged that his termination decision was influenced by a "corporate atmosphere ... unfavorable to older workers." *Id.* at 1213. The Third Circuit reaffirmed that "nondecisionmakers [even if] temporally remote from the decision at issue," may provide some relevant

evidence of discrimination.[5] *Id.* at 1214. Earlier, in *Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994), the same court of appeals held that admissible anecdotal evidence of discrimination includes proof "that the employer in the past had subjected [the plaintiff] to unlawful discriminatory treatment, that the employer treated other, similarly situated persons out of his protected class more favorably, or that the employer has discriminated against other members of his protected class or other protected categories of persons." *Id.* at 765; *accord Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 641 (3d Cir. 1993) (acknowledging that the atmosphere in which a company makes its employment decision can be circumstantial evidence of discrimination).

Similarly, in *Cummings v. Standard Register Co.*, 265 F.3d 56 (1st Cir. 2001), another ADEA case, the First Circuit held the testimony of two former employees relevant to establish a company policy of age discrimination, despite their having different supervisors and working at different jobs in widely separated locations. Plaintiff Cummings, like Respondent Mendelsohn, sought to introduce this

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[5] The court of appeals affirmed a trial court decision to admit testimony of five former employees, as well as a verdict for plaintiff on state law grounds. Despite questions as to the evidentiary value of the co-worker testimony, the Third Circuit panel concluded the evidence was relevant, and that its probative force outweighed its potential prejudicial effect. 50 F.3d at 1215. In reaching this result, the court specifically rejected the employer's arguments that a different result was compelled by *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984), on which Petitioner relies, *see* Pet. Br. 22, 44, noting that the *Haskell* court had before it and declined to hear testimony of six former employees because it did not amount to statistically significant evidence of a pattern and practice of discrimination," *Abrams*, 50 F.3d at 1215 n.12. *See Haskell*, 743 F.2d at 121 ("For such statistical evidence to be probative, however, the sample must be large enough to permit an inference that age was a determinative factor in the employer's decision.").

"other supervisor" evidence to show a pattern of age-biased behavior in connection with company-wide corporate restructuring. Cummings, a Massachusetts resident, was terminated after Standard Register acquired UARCO where Cummings had worked for seventeen years. *Id.* at 60-61. Defendant's asserted reason for the termination was that its restructuring eliminated overlapping sales areas; the jury, however, found that Cummings was terminated because of his age. *Id.* at 62.

At trial, plaintiff offered testimony of two former Standard Register employees, "who believed that they also were victims of age discrimination." *Id.* at 61. Weatherly, a field engineer in Nashville, Tennessee, testified that his boss, Perkins, said he would be terminating Weatherly because he and the other employees were "too old to do the job," and because "the older guys and guys like him just didn't have the stamina to keep up with this." *Id.* Talley, a sales representative in Seattle, Washington, testified his supervisor, Campbell, repeatedly told him that Standard Register needed to make room for "young blood." *Id.* The court of appeals was untroubled by absence of a tight geographical or chain-of-command nexus between plaintiff and his witnesses. Rather, the First Circuit found the district court properly exercised its discretion to admit the evidence. Unlike the district court in *Mendelsohn*, the trial court in *Cummings* understood that such evidence of "corporate atmosphere" was "relevant for the purposes of drawing inferences one way or the other." That is, the jury was entitled to hear "what happened at the company in general and what people heard" in order to consider whether "there was an atmosphere that permit[ted] the inference [the plaintiff was] asking the jury to draw." *Id.* at 63.

The failure of the district court in *Mendelsohn* to conduct such an analysis resulted in the improper exclusion of similarly relevant anecdotal evidence of a

tainted corporate atmosphere in which the decision to terminate her was made.

Even when there is some prospect of prejudicial impact, courts should be wary of excluding circumstantial proof of an "atmosphere" of discrimination. In *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130 (4th Cir. 1988), a race discrimination case, the Fourth Circuit held that under Fed. R. Evid. 403 evidence of racial slurs by ten firefighters who voted on the plaintiff's employment application was admissible, since "the value of these statements in revealing state of mind may still be significant despite the fact that the statements did not relate to the specific decision at issue." *Id.* at 1134. The court explained its Rule 403 balancing process as follows:

> Jury trials are not antiseptic events, and in a case involving racial discrimination, upsetting facts may well emerge. The general policy of the Federal Rules, however, is that all relevant material should be laid before the jury as it engages in the truth-finding process. . . . [C]ourts are obligated to use the power conferred by Rule 403 sparingly, and to remember that the Federal Rules favor placing even the nastier side of human nature before the jury if to do so would aid in the search for truth.

Id. at 1135. Petitioner and its supporting *amici* claim that potential harm to employers' reputations of "other supervisor evidence," however slight, should *always* trump the possibility that such anecdotal proof will be critical to vindication of the fair employment rights of older workers, and by analogy, other workers protected by federal civil rights laws. *Mullen* makes clear how inconsistent with long-established legal standards that position is.

Finally, in *McKenzie v. Carroll International. Corp.*, 610 S.E. 2d 341 (W.Va. 2004), which involved alleged unlawful age discrimination in violation of the West Virginia Human Rights Act, the plaintiff sought to introduce "other alleged acts of age discrimination by [defendant] under Rule 404(b) of the West Virginia Rules of Evidence," which tracks Fed.R. Evid. 404(b). *Id.* at 344. Reversing the trial court's exclusion of such evidence pursuant to defendant's pretrial motion in limine, the West Virginia Supreme Court held "that in an action brought for employment discrimination, a plaintiff may call witnesses to testify about any incident of employment discrimination that the witnesses believe the defendant perpetrated against them, so long as the testimony is relevant to the type of employment discrimination that the plaintiff has alleged." *Id.* at 347.[6] *See Madel v. FCI Mktg., Inc.*, 116 F.3d 1247, 1252-53 (8th Cir. 1997) (evidence of a corporate atmosphere hostile to older employees, together with other evidence, sufficient to establish inference of discrimination). *See also Heynes v. Caruso*, 69 F.3d 1475, 1479 (9th Cir. 1995) (holding that the district court erred in excluding testimony about employer's harassment of other female employees, as such evidence was relevant to prove a discriminatory motive for termination: "It is clear that an employer's conduct tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer's general hostility towards that group is the true reason behind firing an employee who is a member of that group.").

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[6] In *Huddlestone v. United States*, 485 U.S. 681 (1988), this Court pointed out that "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence [*i.e.*, '[e]vidence of other ...acts' which may 'be admissible for ... proof of motive'] as it was with ensuring that restrictions would not be placed on the admission of such evidence." *Id.* at 688-89.

D. Evidence Of A Discriminatory Corporate "Culture" Is Probative Of Discriminatory Intent.

Discriminatory hostility that goes beyond a single supervisor, whether evinced in corporate policies or practices, statements by executives or lesser managers, including nondecisionmakers, or implicit in patterns of treatment of multiple workers, all have been found probative and admissible evidence of intentional discrimination in individual disparate treatment cases.

Just a year after *Reeves*, the court in *Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87 (2d Cir. 2001), held that remarks by a senior executive about "mak[ing] the image of [the company] younger" and reducing "the average employee age to 39" was probative of age bias. The *Slattery* court reasoned that "[s]tatements about changing the corporate culture made by top executives surely have probative value as to possibly discriminatory acts on the part of the lower level supervisors." 248 F.3d at 93. In reversing an order excluding the statement, the Second Circuit relied on *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989), in which a former employee was allowed to testify that a senior vice president of the defendant employer told him that "Westinghouse Credit was a seniority driven company and ... 'I am going to change that.'" 879 F.2d at 54. The Third Circuit explained:

> When a major company executive speaks, "everybody listens" in the corporate hierarchy, and when an executive's comments prove to be disadvantageous to a company's subsequent litigation posture, it can not compartmentalize this executive as if he had nothing more to do with company policy than the janitor or the watchman.

Id. See Kirsch v. Fleet Street, Ltd. 148 F.3d 149 (2d Cir. 1998) (concluding that remarks, made by a sales manager and company director, over time, both before and after the plaintiff's contested termination, to the effect that the company "wanted younger blood" represented the company's policy and were probative of discrimination); *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1109-10 (5th Cir. 1995) (admitting evidence of ageist statements of supervisors and testimony of former HR employee concerned with impact of RIF on older workers; defendant-employer "contest[ing] the admission of evidence of age discrimination against other employees ... misconstrues the law ... such evidence may be highly probative depending on the circumstances").

But even in cases like *Mendelsohn*, where the proffered testimony is from non-supervisory employees, rather than top management (if only indirectly), lower federal courts have admitted such evidence as probative of corporate "culture" giving rise to an inference the plaintiff's adverse employment action was caused by intentional bias. Thus, in *Rose v. National Cash Register Co.*,703 F.2d 225 (6th Cir. 1983), the court affirmed a verdict for plaintiff and rejected a challenge to testimony by two former co-workers who testified that the defendant-employer, "in connection with its corporate reorganization [including a RIF affecting plaintiff], sought to establish a 'new younger' image for the company." 703 F.3d at 226. While the Court of Appeals declined to characterize this evidence as compelling a judgment for plaintiff, the court insisted that it fully justified presenting Mr. Rose's case to a jury. *Id.* at 227. *See Bevan v. Honeywell, Inc.*, 118 F.3d 603, 606-07, 610 (8th Cir. 1997) (affirming jury verdict for plaintiff based in part on testimony of non-decisionmakers regarding employer's conduct implementing a "youth movement" and holding that, although such remarks "standing alone" were "not sufficient to raise an inference of age discrimination," "[i]n a pretext case, such comments are 'surely the kind of fact which would cause a

reasonable trier of fact to raise an eyebrow'" and further, "provid[e] 'threads of evidence' that are 'relevant to the jury'" (citations omitted).[7]

Finally, in *Moorhouse v. Boeing Co.*, 501 F.Supp. 390 (E.D. Pa. 1980), cited by Petitioner, Pet. Br. 25, 40, 44, a case in which the plaintiff alleged a pattern or practice of discrimination against older employees in violation of the ADEA as well as violations of state law, even though the court declined to allow testimony from five former employees of defendant (each of whom was a plaintiff in his own individual lawsuit against Boeing) in plaintiff's case in chief, they were allowed to testify as rebuttal witnesses. Although they were precluded from testifying about their own layoffs, the did provide evidence regarding "the existence of working lifetime employment contracts at Boeing, comments by supervisors concerning age, a purported Boeing policy geared to reducing the age level of the engineering work force, and, a brief background of each witnesses' work history at Boeing." *Moorhouse*, 501 F.Supp. at 393.

E. Anecdotal Evidence Is Especially Critical Where, As Here, The Employer Is Permitted to Present "Other-Supervisor" Evidence of Non-Discrimination.

The Tenth Circuit properly criticized the district court for excluding Respondent's anecdotal "other-supervisor" evidence while permitting Petitioner to present precisely the same kind of evidence, albeit in its own favor. That is, the district court permitted the testimony of Jo Renda, Director of Human Resources, who testified, *inter alia*, about "examples of older employees whom Sprint had retained, even though

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[7] *See also EEOC. v. Century Broad. Corp.*, 957 F.2d 1446, 1457 (7th Cir. 1992) (finding that a supervisor's statements that a radio station wanted "new young sound" supported an inference of age discrimination when considered along with statistical evidence).

they were not supervised by [Respondent supervisor Paul] Reddick." Pet. App. 12a-13a. As a result, "the district court's *in limine* ruling disadvantaged Mendelsohn further [than simply denying her access to relevant affirmative evidence] because Sprint was allowed to portray itself as retaining older employees" while Mendelsohn was not allowed to portray Sprint as disadvantaging other older employees similarly "not supervised by Riddick." *Id.* at 13a.

It is incumbent on the Court to affirm the Tenth Circuit's ruling that it works a fundamental unfairness to the plaintiff in a disparate treatment case when an employer is permitted to present "other-supervisor" evidence, but the plaintiff is not. At the very least both parties must be treated equally.

III. BECAUSE OF THE NATURE OF AGE DISCRIMINATION, BARRING ANECDOTAL OTHER-SUPERVISOR EVIDENCE WOULD ERECT AN INSURMOUNTABLE BARRIER TO OBTAINING RELIEF FOR MANY OF ITS VICTIMS.

In crafting the ADEA, Congress drew heavily on a report by U.S. Labor Secretary W. Willard Wirtz, which Congress had requested when it enacted Title VII of the Civil Rights Act of 1964.[8] Secretary Wirtz's report,[9] "whose findings were confirmed throughout

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[8] Congress directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265.

[9] Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (1965), *reprinted in* U.S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act (1981).

the extensive factfinding undertaken by the Executive Branch and Congress," *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983), concluded that "[a]lthough age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact," and "the available empirical evidence demonstrated that arbitrary age lines were in fact, generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers," *id.* Over the years, this Court has continued to recognize that unjustified assumptions about the effect of age on the ability to work pose significant problems for older workers. *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with age."); *Smith v. City of Jackson,*, 544 U.S. 228, 240 (2005) (noting that although age may be relevant "to an individual's capacity to engage in certain types of employment. Congress recognized that this is not always the case, and that society may perceive those differences to be larger or more consequential than they are in fact"); *Gen. Dynamics Land Sys. Inc. v. Cline*, 540 U.S. 581, 588-89 (2004) (noting that testimony at hearings preceding the passage of the ADEA "dwelled on unjustified assumptions about the effect of age on ability to work" and concluding that "[t]he record thus reflects the common facts that an individual's chances to find and keep a job get worse over time; as between any two people, the younger is in the stronger position, the older more apt to be tagged with demeaning stereotype.").

Unfounded assumptions about the effect of age on performance and productivity may, and often do, infect an entire organization. If an executive holds these types of stereotypes about older workers, and directs, or even merely suggests, that the organization's managers and supervisors make employment decisions consistent with such

stereotypes, the testimony of other employees regarding how their own supervisors treated them is clearly relevant to whether there was a company-wide sentiment that older workers were dispensable or less valuable than the organization's younger workers, and that the employer's supervisors were aware of this attitude and acted upon it.

For example, in *Fast v. Southern Union Co., Inc.*, 149 F.3d 885 (8th Cir. 1998) the president of the company "held a number of meetings with key personnel to explain his corporate philosophy." *Id.* at 887. The executive allegedly told his managers that "'Young blood' was needed . . . and [the company] would benefit from a 'fresh new look'; he preferred a younger work force because older workers tend to 'stagnate'; the 'older work force was pulling the company down'; 'younger workers' were the future of the company; '[the company] was a good place to work for six or seven years, not over ten'; and he preferred a younger work force because they are 'more inquisitive' and have 'more energy.'" *Id.* at 887-88. The *Fast* case is not an anomaly. There are numerous other examples of age discrimination cases where managers and supervisors were informed of comparable "corporate philosophies."[10] Denying other-supervisor

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[10] *See, e.g., Lockhart v. Westinghouse Credit Corp.*, 879 F.2d at 55 ("when a major corporate executive speaks, 'everybody listens' in the corporate hierarchy"); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F. 3d 326, 333-34 (3d Cir. 1995) (finding the CEO's statement that "two of our star young men are in their mid-40s. That group is our future" in a company newsletter was deemed circumstantial evidence of the employer's managerial policy and relevant to show the corporate culture in which a company makes its employment decisions); *Bevan v. Honeywell, Inc.*, 118 F.3d at 606-07, 610 (holding that corporation's "revitalization campaign" where a human resources memo directed supervisors to identify younger promising talents with potential, combined with a letter from an executive referencing "young high talent," demonstrated a company policy to weed out older employees and replace them with younger employees); *Slattery v. Swiss Reinsurance Am.*

evidence to victims of workplaces infected with such bias would make it unnecessarily and unfairly difficult – if not impossible – for them to prove their claims.

Indeed, research has demonstrated that individuals have a tendency to respond to subtle signals that are imbedded in daily interactions with others, and often attempt to bring their behavior into conformity with the norms these signals suggest. *See* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discriminating in Multi-Actor Employment Decision Making*, 61 La. L. Rev. 495, 535-36 (2001). This type of behavior is even more powerful in the workplace, where being perceived as a "team player" is important to career success. *Id.* It follows that if the leaders of a corporation push a certain image, such as one of youth, this will have an effect on middle and lower management's attitudes about age, which will in turn affect their employment decisions. *See Hamblin v. Alliant Techsystems, Inc.*, 636 N.W. 2d 150, 154 (Minn. Ct. App. 2001) ("Discrimination is often the result of subtle, unconscious predispositions. Corporate discrimination does not occur in a vacuum. Discrimination feeds on the actions and statements of those involved in the corporate culture.").

As this Court recognized, one "commonplace conception of American society in recent decades is its character as a 'youth culture' . . . a world were younger is better . . . ." *Cline*, 540 U.S. at 591. If, as the Petitioners urge, all evidence of other-supervisor evidence is barred, older workers who must labor in work places where "younger is better" will face an insurmountable hurdle to proving their claims.

Corp., 248 F.3d at 93 (company chairman's statements in a magazine interview that he intended to make the image of the cony younger and had already reduced the average company age had probative value as to possible discriminatory acts by lower level supervisors).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the court below and hold that relevant anecdotal evidence of discrimination is admissible in an individual discrimination case absent a sufficient reason to exclude it.

Respectfully submitted,

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